

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Placer
(County File No. 016-ACP-PLA-04/05)

Administrative Docket. No. 123

**Dave Sills
Sills Ag Consulting, Inc.
3301 Stonehurst Drive
El Dorado Hills, CA 95762**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR), section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Placer CAC found that the appellant, Dave Sills, dba Sills Ag Consulting, Inc., committed one violation of the State's pesticide laws and regulations, pertaining to 3 CCR section 6434. The commissioner imposed a penalty of \$50 for the violation.

Sills appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the CAC's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

Mr. Dave Sills

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

Factual Background

Dave Sills is a licensed pest control adviser doing business as Sills Ag Consulting, Inc. On May 20, 2004, Mr. Sills obtained a restricted materials permit on behalf of growers Steve and Rhonda Stutz for the application of the herbicide Ordram on fifteen rice fields operated by the Stutz's, including field 6 and field 10 on Phillip Road. On June 21, 2004, Mr. Sills issued a written pest control recommendation on behalf of the Stutz's, for the use of Ordram, to be applied on 66.90 acres of rice in field 6, with a proposed application date of June 23, 2004. The applicator was identified as Twin Cities Aviation.

On June 21, 2004, at 11:43 a.m. Twin Cities called the Placer CAC and left a message on a dedicated voice mail phone line of their Notice of Intent (NOI) to apply Ordram on June 22, 2004. The message was transcribed by a clerk onto a "Notice of Intent to Apply Rice Herbicides" form. The form recorded the pesticide application would be to 70 acres in field 10. The CAC staff usually make an audio tape recording of the messages left on the dedicated voice mail system as well, but failed to record this message.

On June 25, 2004, Twin Cities filed a Pesticide Use Report (PUR) with the CAC indicating that Ordram had been applied to the 66.90 acres of field 6.

The CAC issued Mr. Sills a notice of violation of 3 CCR section 6434. The County imposed a minimum fine of \$50 because the violation resulted from a paperwork error and did not result in an environmental problem. Mr. Sills appealed the violation and requested a hearing. After hearing the evidence presented, the Hearing Officer found that Mr. Sills violated 3 CCR section 6434 and that the violation was properly classified as a Class C violation. Mr. Sills appealed the Hearing Officer's decision.

California Code of Regulations section 6434

3 CCR section 6434 provides that the CAC is to be notified 24 hours in advance of the application of a pesticide requiring a permit. The NOI is to include the permit number, the name

and address of the permittee and applicator, the location of areas to be treated and the name of farm operator, crop or commodity, approximate acres or other units, method of application, pesticide, dilution, pest to be controlled, date intended application is to commence, and any changes to the location and identity of the treatment areas since the permit was issued.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as “Class A,” “Class B,” and “Class C.” A “Class A” violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a violation that is a repeat Class B violation. The fine range for Class A violations is \$700-\$5,000. A “Class B” violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is \$250-\$1,000. A “Class C” violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$500.

Appellant’s Allegations

The appellant contends that the staff at the Placer CAC made a clerical error in transcribing the message left by Twin Cities. Appellant contends that the CAC does not have a tape-recording available preventing him from proving the transcription error and further contends that the CAC altered the NOI form making it inadmissible. Appellant argues that three documents prove his contention. Those three documents each reference Ordram application to field 6 (66.90 acres) and are: the Pest Control Recommendation dated June 21, 2004 (generated January 26, 2005); the State of California, California Environmental Protection Agency/DPR Notice of Intent form dated January 26, 2005; and the PUR dated June 25, 2004. Lastly, appellant contends that since the CAC made a mistake in the Notice of Decision giving him ten days to appeal instead of 30 days, the CAC made the transcription mistake as well.

The Hearing Officer’s Decision

The Hearing Officer found that Twin Cities called in an NOI to apply Ordram to field 10 (70 acres) on June 22, 2004. The Hearing Officer also found that no NOI was made in regards to field 6 (66.90 acres) in violation of 3 CCR section 6434.

In weighing the evidence, the Hearing Officer determined that, while CAC staff could have made a clerical error, it was more likely than not that Twin Cities called in the wrong field. Her basis for this finding was the logical inference that the clerk would not have made two wrong entries with regard to the field number and the number of acres. The Hearing Officer reasoned that the NOI received for field 10 indicating that only 70 acres of a 74.60 acre field was going

to be treated was consistent with the permit requirements. A permittee may treat fewer acres than indicated on a permit, but not more acres. If the NOI was for field 6, the number of acres indicated would have exceeded the 66.90 acre permit limitation. Thus, if the appellant's position was to be accepted, the clerk mis-recorded both the field number and the number of acres off of the voice mail system. The Hearing Officer took note of the fact that Mr. Sills himself did not call in the NOI and had no first hand knowledge of what Twin Cities actually said in its message. Lastly, the Hearing Officer considered the assertion by CAC staff that an error had not been made. In recognizing a clerical error on the part of Twin Cities, the Hearing Officer determined that a Class C violation at the lowest range was appropriate.

Analysis and Conclusion

Appellant offers three forms as proof that field 6 was the subject of the NOI called in by Twin Cities. Two of the forms, the Pest Control Recommendation and the California Environmental Protection Agency/DPR Notice of Intent form, are computer-generated forms that contain a generation date of January 26, 2005. There is no evidence that these forms were provided to the CAC as a notice of a pending pesticide application. Mr. Sills testified that he did not provide the CAC the NOI form because the County refuses to accept faxed notices. Mr. Sills testified that he did not call in the NOI and he was unable to testify that Twin Cities called in an NOI on field 6. The third form, the PUR, provides proof that the application was made to field 6. These three forms are not evidence that a NOI was provided to the CAC for the application on field 6.

The CAC offered the "Notice of Intent to Apply Rice Herbicides" that contains the notation that Twin Cities called in a NOI regarding field 10. Josh Huntsinger testified that he spoke to Ms. Peggy Laurie who informed him that she had filled out the form accurately. Mr. Huntsinger also testified that the staff failed to record all of the voice mail messages left June 21, 2004. While Mr. Huntsinger's testimony is not as compelling as testimony from Ms. Laurie would have been, there is no contradictory evidence.

The Hearing Officer drew inferences from the documents provided and the testimony that the most likely scenario was that Twin Cities called in a NOI on the wrong field. There is sufficient evidence in the record to support this inference.

In conclusion, the Director finds that the evidence in the record is sufficient to support the Hearing Officer's decision. There is also sufficient evidence to support the penalty assessed.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$50 fine.

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Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**



By: _____
Mary-Ann Warmerdam
Director

Dated: **5/19/05** _____